DAVID Q. TOGNONI

IBLA 94-476 Decided March 6, 1997

Appeal from a decision of the District Manager, Rawlins (Wyoming) District Office, Bureau of Land Management, ordering payment for mineral material removed in trespass.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Locatability of Mineral: Generally--Mining Claims: Specific Mineral Involved: Gravel

   Natural crushing, stratification and sorting of common variety building stone material can give a deposit a special, distinct value over any other known source of the same material in the general area. If properties inherent in the mineral deposit render an economic advantage over other deposits, that fact, when established by a preponderance of the evidence, is sufficient to classify the deposit as locatable, for it demonstrates the mineral deposit possesses a unique property distinguishing it from other common varieties of building stone.

2. Administrative Procedure: Generally--Administrative Procedure: Administrative Review--Administrative Procedure: Burden of Proof--Administrative Procedure: Substantial Evidence--Mining Claims: Generally--Mining Claims: Common Varieties of Minerals--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Locatability of Mineral--Mining Claims: Specific Mineral Involved: Gravel--Trespass: Generally

   It is not sufficient that a claimant assert that a material classified under the Common Varieties Act is an uncommon variety because it possesses some unique property giving the deposit a distinct and special economic value. The claimant must demonstrate the existence of distinct and special economic values.

> Absent evidence showing distinct and special economic values over and above the normal general run of such deposits, or a showing that the deposit from which the mineral material was removed possessed some intrinsic quality that differentiates it from ordinary deposits of similar material, giving the deposit a competitive edge over general run gravel deposits, the mineral material will be deemed to be a common variety.

APPEARANCES: Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management; Rodney G. Johnson, Esq., Phoenix, Arizona, for David Q. Tognoni.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

David Q. Tognoni has appealed the March 31, 1994, decision issued by the Rawlins District Manager, Bureau of Land Management (BLM), that Tognoni had removed sand and gravel from the NW¼ of sec. 6, T. 12 N., R. 89 W., sixth principal meridian, Wyoming, in trespass, and directing Tognoni to pay $4,546.19 in trespass damages.

On March 5, 1989, David Q. Tognoni located the DQT #1, DQT #2, DQT #3, and DQT #4 placer mining claims (W-MC-238273 through W-MC-238276) in sec. 6, T. 12 N., R. 89 W., sixth principal meridian, Carbon County, Wyoming. On April 20, 1989, Tognoni and the State of Wyoming Highway Department entered into a contract for the sale of the gravel from Tognoni's claims. 1/ Removal of mineral material commenced on May 8, 1989, and ended on January 4, 1990. Records obtained from the Wyoming Highway Department show that 11,365.48 tons of gravel were purchased from Tognoni and that the Wyoming Highway Department paid Tognoni a royalty of $4,546.19 ($0.40 per ton). The gravel was washed, crushed, and applied as a chipcoat to paved roads near the site where the material was removed.

On June 28, 1991, the Chief, Branch of Records, Wyoming State Office, BLM, issued a decision that the DQT #1 through #4 mining claims would automatically be deemed abandoned and void for failure to submit the annual filings required by 43 U.S.C. § 1744 (1994) if Tognoni did not present evidence that he had filed the required paperwork or appeal the decision to this Board within 30 days from the date of receipt of the June 28, 1991, decision. See 43 CFR 3833.2-3(a); U.S. v. Locke, 471 U.S. 84 (1985). Tognoni failed to respond to or appeal BLM's June 28, 1991, decision.

1/ In an Aug. 9, 1994, affidavit signed by Robert P. Smith, an employee of the Wyoming Highway Department, Smith stated that Tognoni had entered into an agreement with the Wyoming Highway Department for the sale of gravel to be used as a road-surfacing aggregate in a highway project in January 1989.

On March 3, 1994, the Acting Area Manager, Rawlins (Wyoming) District Office, BLM, sent Trespass Notice WYW-130936 to Tognoni alleging that Tognoni "sold mineral materials for use as aggregate to the Wyoming Department of Transportation," an action in violation of the Materials Act of July 31, 1947, the Surface Resources Act of July 23, 1955 (the Common Varieties Act), 30 U.S.C. § 611 (1994), and 43 CFR 3603.1. Tognoni was further advised that he had 30 days from receipt to present evidence that he was not in trespass.

On March 21, 1994, Tognoni filed a response, denying the alleged trespass action and asserting that the gravel he sold to the Wyoming Highway Department was "located and mined as a special and distinct, uncommon gravel." Tognoni asserted:

> The unique features of this material is [sic] that it was naturally crushed and shaped into chips, which are uniquely suited to asphalt paving uses. The chips have special hardness different from common varieties. In fact, these materials deposits expressly conform to the several Acts you have cited in the trespass notice.

(Letter filed Mar. 21, 1994, at 1).

In his March 31, 1994, decision, the Rawlins District Manager, BLM, stated that, based on information obtained by BLM, the gravel Tognoni sold to the Wyoming Department of Transportation was a common variety, which was neither unique nor distinct from other gravel deposits in the Savery, Wyoming, area. Accordingly, BLM deemed the gravel to have been removed in trespass, and demanded payment of $4,546.19 in trespass damages.

In his statement of reasons (SOR), Tognoni asserts that trespass notice WYW-130936 was invalid because the deposit was "properly located," that the deposit was "distinct and special," and that he met the guidelines stated in McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969) for distinguishing the deposit from common and uncommon varieties of mineral materials identified in section 3 of the Common Varieties Act.

Before considering the issues raised by Tognoni on appeal, we believe it will be helpful to discuss the legal principles governing the validity of mining claims located for common variety materials. The Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (1994), provides that "[a]ny person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone" and locate a placer mineral claim. Sand and gravel is considered to be a building stone. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied 393 U.S. 1066 (1969); Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1994), is usually referred to as the "Common Varieties Act," and

we will refer to that act as the Common Varieties Act in this decision. Section 3 expressly provides:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located * * *. "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value.

30 U.S.C. § 611 (1994).

When Congress passed the Common Varieties Act, it specifically removed common varieties of sand and gravel from location under the Mining Law of 1872 and made them subject to the Materials Act of July 31, 1947. 2/ A claimant who locates a claim for mineral material listed in the Common Varieties Act must demonstrate, by a preponderance of the evidence, that the mineral material is an uncommon variety, having a unique property giving it a distinct and special economic value.

Further definition of a common variety mineral is found at 43 CFR 3711.1. Paragraph (a) restates the provisions of 30 U.S.C. § 611 (1994). Paragraph (b) provides, in pertinent part:

> (b) "Common varieties" includes deposits which * * * do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material.

43 CFR 3711.1(b).

2/ See U.S. v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982) for a discussion of the legislative history of the Common Varieties Act.

In McClarty v. Secretary of the Interior, supra (hereafter cited as McClarty), the court set out guidelines for

> distinguishing between common varieties and uncommon varieties of building stone. These guidelines * * * are (1) there must be a comparison of the mineral deposit in question with other deposits of such mineral generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

Id. at 908; see also U.S. v. Multiple Use, Inc., 120 IBLA 63 (1991); U.S. v. Crawford, 109 IBLA 264 (1989); U.S. v. Wolk, 100 IBLA 167 (1987).

This Board has applied the McClarty analysis in a number of common varieties cases arising under the Common Varieties Act. See, e.g., U.S. v. Multiple Use, Inc., supra (pumice); U.S. v. Fisher, 115 IBLA 277 (1990) (sand); U.S. v. Foresyth, 100 IBLA 185 (1987) (limestone). When the preponderance of evidence found in the record on appeal shows that, when compared with other deposits of the same mineral material, the claimed mineral material is not unique, or that it is not distinguishable from other common varieties of gravel in the area, or that it does not command a price higher than other common varieties of gravel, the mineral material will be deemed to be a common variety, and a claim of trespass will lie for its unauthorized removal from the public lands.

The thrust of Tognoni's argument on appeal is that the gravel removed between May 8, 1989, and January 4, 1990, met the guidelines stated in McClarty, supra, and was therefore, an uncommon variety of gravel. We have examined the evidence in the record, including that submitted by Tognoni on appeal, and will now address that evidence.

The first guideline in McClarty, supra, states that "there must be a comparison of the mineral deposit in question with other deposits of such minerals generally." Tognoni submits a May 29, 1986, letter from the Chief Engineer Geologist, Wyoming State Highway Department, stating in pertinent part that: "Attached is a copy of the information we have on the Gross Pit. We would like to do a more detailed investigation in the future when the project by Savory [sic] is being designed. It is our plan to utilize this material in the future if still available."

Five pages of information were transmitted with the May 29 letter. A one-page "Materials Deposit Layout Sheet-Pit Detail Diagram" (Pit Diagram), dated February 28, 1985, contains drawings of three gravel pit areas

identified as the Gross Pit, located in the NW¼, sec. 6, T. 12 N, R. 89 W. 3/ Sampling areas are designated in the pit areas. Eleven sample sites are shown for pit area 1, seven for pit area 2, and sixteen for pit area 3. The remaining four pages are titled "Materials Deposit Layout Sheet." The first lists analytic results for eleven samples taken at "Gross Pit No. 1"; the second lists analytic results for seven rock samples taken at "Gross Pit #2"; and the third and fourth list analytic results for sixteen samples taken at "Gross Pit #3." 4/

Tognoni states that the gravel sold to the State of Wyoming is an uncommon variety of gravel and that the analyses of the Gross Pit materials conducted by the Wyoming State Highway Department

> establish without question that * * * the Tognoni gravel pits meet state and federal qualification requirements. The hardness of the materials and the relative ease by which the materials were utilized in the overlay project created a true economic advantage for the use of the materials. The economic advantage came from the relatively low costs for removal and application of the materials to the construction project. Because the material required less processing, the overall project costs were substantially lower for the use of the materials in question.

(SOR at 2).

In response, BLM argues that Tognoni failed to provide any information to show that other gravel deposits in the area do not meet State of Wyoming or Federal standards and failed to supply information comparing gravel deposits in the DQT #1 through DQT #4 claims with any other gravel deposits in the area (Motion for Summary Judgment at 2). 5/

In U.S. v. Thomas, 90 IBLA 255 (1986), vacated and remanded for hearing on other grounds, Thomas v. Hodel, Civ. No. C-86-282K (May 18, 1988), the Board noted that

> [p]rior to the passage of the Act of July 23, 1955, "specification material" was regarded as locatable on the ground that inferior grades would not suffice. United States v. Bienick,

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3/ The Pit Diagram also contains the following notation:

"The State Highway Department assumes no responsibility for the accuracy of the test data shown for the proposed gravel pits except at the exact locations or points where samples were taken. The above test data is [sic] provided solely for the information of the contractor and its accuracy is not guaranteed."

4/ The Wyoming Highway Department engineering estimate, which was used to calculate the royalty paid to Tognoni, notes that the material was removed from Gross Pit No. 3.

5/ There is nothing in the Wyoming State Highway Department reports that identifies the gravel tested as having any uncommon or unusual quality.

> 14 IBLA 290, 298 (Steubing, A. J. concurring). However, even where material was previously regarded as locatable because it met engineering standards for "compaction, hardness, soundness, stability, favorable gradation," etc., in road building and similar work, such materials have been treated as common varieties and were not locatable after passage of the Act of July 23, 1955, because materials which meet the standard are of widespread occurrence. Id. at 298.

U.S. v. Thomas, supra at 257. Therefore, the mere fact that a deposit of sand and gravel meets state or Federal road building requirements does not render the deposit an uncommon variety of sand and gravel. The balance of Tognoni's statement in support of his conclusion that the deposit meets the first McClarty guideline is more properly addressed in a discussion of the third and fourth guidelines.

Tognoni submits evidence that could qualify as a comparison of the gravel deposit on the DQT #1, DQT #2, DQT #3, and DQT #4 claims with other deposits of gravel in the general area. That evidence is found in an affidavit by Robert P. Smith, an engineer employed by the Wyoming State Highway Department who asserts that in his professional opinion "the materials purchased from the Tognoni pits were of higher quality and higher value than common gravel, and would produce a higher price per yard in the marketplace than other common varieties of Wyoming gravel."

The case file also contains a March 23, 1994, letter from Jim H. Webb, Acting Area Manager, Great Divide (Wyoming) Resource Area, to Smith confirming and describing a telephone conversation between Smith and Mark Newman, geologist, Great Divide Resource Area, that had taken place the same day. Webb's letter states that, in response to questions from Newman, Smith advised Newman that: (1) the gravel from Tognoni's claims had been sampled and tested by the State of Wyoming; (2) the gravel the State had purchased from Tognoni was no different from other gravel available in the Little Snake River Valley; (3) the royalty paid Tognoni was at the standard rate; (4) the material purchased from Tognoni was crushed to size prior to use; (5) the gravel on the Tognoni claims was selected because it was convenient to the work area and had previously been tested by the Wyoming Department of Transportation.

The second guideline in McClarty, supra, states that "the mineral deposit in question must have a unique property." To support his assertion that the gravel deposits on the claims have a unique property Tognoni states:

> The absence of any significant overburden and other impurities, combined with a twelve foot depth of high quality, hard and uncontaminated gravel, make the materials distinct and special, and substantially different from common varieties of gravel materials. There was very little waste compared with other materials.

(SOR at 2-3).

[1] BLM responds by stating that Tognoni fails to demonstrate how the gravel from his claims possessed unique properties because Tognoni describes the physical characteristics of the site where the gravel was mined. BLM asserts that the facts presented by Tognoni are of no consequence because they are extrinsic and do not identify unique properties inherent in the mineral material (Motion for Summary Judgment at 3). This argument is incorrect.

In U.S. v. McCormick, 27 IBLA 65 (1976), this Board found that

> natural crushing, stratification and sorting of the material has indeed lent the deposit a special, distinct value over any other known source of material for this purpose with a radius of at least 50 miles from Flagstaff, Arizona, which is considered to be center of the market area served by these several deposits.

Id. at 69. In U.S. v. Pope, 25 IBLA 199 (1976), the Board found that the material in question was naturally fractured so as to preclude the necessity for drilling, blasting, and other quarry work, requiring only a minimum of effort to produce and prepare it for use, the economic advantage thereby gained over other deposits was sufficient to classify the deposit as locatable. The key factor in both cases was the nature of the deposit, rather than the properties inherent in the mineral material, as urged by BLM.

Notwithstanding BLM's misinterpretation of the meaning of the second McClarty guideline, we do not find that Tognoni's unsupported statement that "absence of any significant overburden and other impurities, combined with a twelve foot depth of high quality, hard and uncontaminated gravel," meets that guideline. U.S. v. McCormick, supra, aptly illustrates why Tognoni has fallen far short of demonstrating how the physical characteristics he has set out render the gravel he sold to the Wyoming State Highway Department unique. He has submitted no evidence of the amount of overburden or depth of gravel present in other gravel deposits in the area. He has submitted no evidence that would allow a comparison of the hardness of the gravel or its quality, or of the nature or quantity of the impurities found in Gross Pit No. 3, or the nature or quantity of impurities found in other gravel in the area. Simply stated, there is no foundation for his conclusory statement.

Tognoni also asserts that the gravel falls into several classification categories: Type 1, large base coarse; Type 2, base coarse; coarse asphalt concrete aggregate; intermediate asphalt concrete, surface chips; sand products; miscellaneous concrete mixes; and high specific gravity Portland cement concrete aggregate (SOR at 3). He also states that the "materials were mined and used directly in the highway surfacing project" and "were ideal for * * * use in the surfacing project * * * because of [their] relatively low cost" (SOR at 3).

BLM asserts that Tognoni's list of gravel classifications for the gravel mined from his claims fails to identify any properties that "would

* * * distinguish it from any other gravel in Wyoming, and hence does not actually apply the second guideline" (Motion for Summary Judgment at 3). We agree. As noted in U.S. v. Multiple Use, Inc., supra, the physical characteristic identified by the claimant must be shown to be unique, imparting a distinct, special economic value over and above the general run of similar deposits when the mineral material is used in the manner described. There is nothing in the file to demonstrate that the listed uses for the sand and gravel on the claims renders that sand and gravel unique or imparts a distinct, special economic value over and above the general run of similar deposits.

The third guideline in McClarty, supra, states that the unique property must give the deposit a distinct and special value. To support his contention that the gravel from the claims meets the third McClarty guideline, Tognoni asserts that the drilling data in the Wyoming State Highway Report on the Gross Pit areas 1, 2, and 3 establish "without question that the hardness, absence of significant overburden, ease of preparation for use, and low levels of waste give the deposits distinct and special value." Tognoni also asserts that the drilling data establish that "screening was accomplished with relative ease, there was minimum crushing necessary, and with high interparticle sheer strength, the material was easily compacted in its use as surfacing for the highway project" (SOR at 4).

BLM argues that Tognoni has failed to identify a "unique property" that gives the gravel from his claim the "distinct and special values" required to meet the third McClarty guideline. BLM observes that Tognoni's assertions of "distinct and special" values repeat extrinsic values not inherent in the mineral and thus are not responsive to the third guideline in the McClarty test (Motion for Summary Judgment at 3).

Tognoni's description of the gravel removed from Gross Pit No. 3 could be true. Accepting as true all of the statements Tognoni has made as to the physical characteristics of the gravel removed from Gross Pit No. 3, there is nothing that establishes the fact that gravel having these characteristics is unique in the general area of that pit.

For ease and to avoid repetition, we will address the fourth and fifth guidelines together. The fourth guideline in McClarty, supra, states that "if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use." The fifth guideline in McClarty, supra, states that "the distinct and special value must be reflected by the higher price which the material commands in the market place."

Tognoni claims that the gravel from his claim meets the fourth McClarty guideline because it has distinct and special value for ordinary use. In support of this assertion, Tognoni argues as follows:

> The minimum overburden and nominal waste, coupled with the substantial depth of high quality materials, easily compacted and useful for a wide range of projects, applications and uses, clearly qualifies the Tognoni deposits as distinct and special in respect to ordinary use for the materials. These materials

> are high grade and may be sold as such, particularly in respect to use of the materials as aggregate for compaction in surfacing projects and applications where stable bases must be obtained for longer term use of equipment or machinery positioned on such bases.
>
> The discards from the Wyoming project were sold for higher value because they could be compacted easily. The materials were used in the oil patch in northwest Colorado and southern Wyoming by Vandis Construction Company, particularly to be placed under compressors requiring stable bases for long-term installation purposes.

(SOR at 4).

Tognoni argues that the gravels from the claims meet the fifth McClarty guideline because they "demand a premium price in the marketplace for use as asphalt concrete aggregate, chips and other materials easily compacted where high hardness qualities are required" (SOR at 4, 5). Tognoni also asserts that the Wyoming Highway Department "* * * was quite satisfied with the quality and distinct properties of the materials" and that materials left over and not used by the Wyoming State Highway Department "* * * were sold to several users." 6/

In support of his SOR Tognoni has filed his own affidavit and curriculum vitae detailing his credentials as a professional geological engineer. Tognoni's affidavit states: "In my professional opinion, based upon my years of experience as a geological engineer, I am absolutely convinced that the materials are special and distinct and are therefore locateable [sic]" (Affidavit of David Q. Tognoni at 3). 7/ This affidavit fails to set any foundation for the stated conclusions, and, without this foundation, provides nothing more than a general conclusory statement.

BLM argues that Tognoni's assertion that his claims meet the fourth McClarty guideline emphasizes extrinsic factors such as minimum overburden, nominal waste, ease of compaction and range of use. BLM asserts that such factors are irrelevant because they do not identify values inherent in the mineral (Motion for Summary Judgment at 3). The error in this argument was addressed above. However, this error is not material.

6/ Tognoni does not identify the "several users," proffer any evidence of what they purchased or paid, or state how the selling price compared to the price paid by the State of Wyoming or to the price paid for similar gravel products sold in the general area.

7/ Tognoni's professional credentials, as outlined in his curriculum vitae, suggest broad experience. However, that experience, standing alone, is irrelevant in determining whether the gravel sold by Tognoni to the Wyoming State Highway Department between May 8, 1989, and Jan. 4, 1990, was of an uncommon variety under the Common Varieties Act. See, e.g., Cabot Sedgwick v. O.M. Parker, 27 IBLA 256 (1976) (statements of a certified and registered expert witness were found to have insufficient foundation).

BLM argues that Tognoni's assertions regarding the fifth guideline are without merit because Tognoni did not state the price he received or
compare the prices he received with the ordinary price paid for ordinary gravel (Motion for Summary Judgment at 4).

[3] If there is a question regarding what is necessary to demonstrate the existence of distinct and special values, a review of prior decisions issued by this Board quickly resolves that question.

> [A deposit] can be found unique only if its characteristics give it a substantial economic advantage over other deposits which can be used for the same purposes. [If] there is no indication in the record that the material as a finished product sells for more than any other material used for the same purpose, it generally would be an uncommon variety only if its production costs are so substantially less than that of other materials with which it is competitive that it yields the claimant a substantially higher profit.

U.S. v. McCormick, supra at 94. In U.S. v. Multiple Use, Inc., supra, we addressed this specific issue in some detail:

> The sales price of the material sold for a "common variety use" is one of the most important facts to be considered in a contest involving the common variety question. When a mineral is of a common variety, a buyer can obtain his mineral product from many sources. Thus, the market is almost always controlled by the location of the deposit (transportation costs) and control of the deposit (ownership), rather than some intrinsic property of the mineral material.
>
> In fact the common variety sales price is more important to a determination that the mineral is an uncommon variety than it is for a common variety determination. * * * The willingness of a user to buy a mineral material at a higher price is a clear indication that the mineral material has a special intrinsic property that renders it an uncommon variety. If the sales price of the mineral material sold for common variety uses is established, the value of "other deposits of such mineral generally" has been determined.
>
> Once a common variety sales price is established, evidence of an arm's-length purchaser's willingness to pay much more than the "common variety price" for a particular mineral material strongly supports a finding that the deposit of that material is intrinsically unique.

Id. at 78-79.

BLM has submitted evidence showing that the Wyoming State Highway Department paid a $0.40 per ton royalty for the 11,365.48 tons of gravel material it purchased from Tognoni and evidence that this is the royalty the state normally paid for gravel to use in road surfacing construction.

The file also contains a statement of the Wyoming State Department of Transportation policy regarding price paid when purchasing sand and gravel for road construction. This policy is outlined in a September 13, 1994, letter from Lawrence A. Bobbitt, III, Senior Assistant Attorney General, State of Wyoming, to Bill Watters, Acting Area Manager, Great Divide Resource Area, BLM. Bobbitt states:

> As far as WDT [Wyoming Department of Transportation] is concerned, any sand and gravel they purchase is only useful for road building purposes. Payments made for the gravel do not indicate any special value for the materials in question. In fact, any gravel purchased anywhere in Wyoming would be basically only be [sic] useful for roadbuilding purposes unless it was close enough to a cement plant to offset the considerable expense of the ton-mile hauling cost.
>
> WDT only uses borrow material for road building purposes and does not pay more than the fair value of material used for those purposes. In short the royalty paid for the gravel in question was the standard rate and was chosen for its convenience to the work area, not because of any particular quality it might have had. The fact that it was of a superior type was irrelevant to use of the material for road building purposes and the fact is that WDT did not pay any different royalty for this material.

(Letter from Lawrence A. Bobbitt, III, Senior Assistant Attorney General, to Bill Watters at 1, 2; Attachment 1, Respondent's Reply to Appellant's Response). 8/ This evidence establishes the "sales price" for

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8/ Tognoni filed a motion to strike this letter "for the reason that the letter is not reliable evidence, it is hearsay, and it does not constitute an affidavit within the meaning of Rule 56(e) of the Federal Rules of Civil Procedure" (Appellant's Motion to Strike Letter of Wyoming Attorney General at 1). We find appellant's motion to be without merit. The Administrative Procedure Act (APA) provides, in pertinent part, that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d) (1994). Hearsay evidence is not inadmissible per se. Bennett v. National Transportation Safety Board, 66 F.3d 1130 (10th Cir. 1995). Hearsay evidence that meets the standard of section 556(d) of the APA can be weighed in agency proceedings according to its truthfulness, reasonableness, and credibility. Veg-Mix, Inc. v. U.S. Department of Agriculture, 832 F.2d 601 (D.C. Cir. 1987). The probative value and reliability of Senior Assistant Attorney General Bobbitt's letter are supported by other factors. The statement regarding policies followed by the Wyoming Transportation Department in the selection and purchase of gravel to be used in highway surfacing projects is conveyed by Bobbitt in his official capacity in a signed and dated letter written on official letterhead. Further, Bobbitt's statement corroborates statements made to BLM by Robert P. Smith, P.E., an employee of the Wyoming State Highway Department. See Calhoun v. Bailar, 626 F.2d 145 (1980), cert. denied, 101 S. Ct. 3033 (1981).

common variety gravel in the area of the Gross Pit No. 3 at $0.40 per ton, expressed in terms of a royalty.

As noted above, Tognoni asserts that he sold gravel to the Wyoming State Highway Department and an entity identified as Vandis Construction Company. The price for the material paid by the State of Wyoming has been established as the going price in the area for common variety gravel. Tognoni has offered no evidence of the nature of the Vandis transaction or any evidence that would indicate that the royalty paid by the State of Wyoming was higher than the royalty it paid for common variety sand and gravel. Tognoni has tendered nothing that would support a comparison of the sale price paid for the gravel sold to the Wyoming Highway Department with the prices paid for common variety gravel used as aggregate in paving state roads in the area. This is information that Tognoni is particularly well suited to provide.

When a party has relevant evidence within its control which it fails to produce, and such evidence would be expected to be produced under the circumstances, such failure gives rise to the inference that the evidence is unfavorable. Patricia C. Alker, 79 IBLA 123 (1984); Hal Carson, Jr., 78 IBLA 333 (1984). It is also well-established Board precedent that an unsupported allegation of error is insufficient, and that an appellant who does not support allegations with evidence showing error cannot be afforded favorable consideration. See Twin Arrow, Inc., 118 IBLA 55, 58-59 (1991); Leonard J. Olheiser, 106 IBLA 214 (1988); U.S. v. Connor, 72 IBLA 254 (1986).

In summary, we find Tognoni has failed to establish by a preponderance of the evidence that the gravel sold to the State of Wyoming Highway Department between May 8, 1989, and January 4, 1990, had a distinct, special economic value for use in road construction over and above the normal general run of such deposits, or that the deposit from which that gravel was removed possessed some intrinsic quality that differentiates it from ordinary deposits of gravel, giving the deposit a competitive edge over general run gravel deposits. The gravel sold to the Wyoming State Highway Department was common variety gravel, and was therefore not subject to location under the Mining Law of 1872.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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R.W. Mullen
Administrative Judge

I concur:

_____
C. Randall Grant, Jr.
Administrative Judge